(3)

86-780

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BRONSON C. LA FOLLETTE,
Attorney General of Wisconsin,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY and BURLINGTON NORTHERN, INC., BURLINGTON NORTHERN DOCK CORPORATION,

Respondents.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT (VOLUME II)

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54PP

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Nos. 84-2358 and 84-2359

BURLINGTON NORTHERN, INC., and
BURLINGTON NORTHERN DOCK CORPORATION,

Plaintiffs-Appellants,

v.

THE CITY OF SUPERIOR, WISCONSIN,

Defendant-Respondent.

Nos. 84-2360 and 84-2361

BURLINGTON NORTHERN RAILROAD
COMPANY AND BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs-Appellants,

v.

THE CITY OF SUPERIOR, WISCONSIN,

Defendant-Respondent.

MOTION FOR RECONSIDERATION

Pursuant to secs. (rules) 809.14 and 809.64, Stats., the Attorney General

moves for reconsideration of the court's June 25, 1986, decision, invalidating sec. 70.40, Stats. (1983-84) as violative of the Commerce Clause of the United States Constitution. The grounds for this motion are:

1. The court overlooked and misconstrued significant and controlling facts appearing in the record in deciding that the statute was discriminatory in effect; and

2. The court overlooked controlling legal precedent in deciding that the statute was unconstitutional, irrespective of its effect, merely because its purpose was arguably discriminatory.

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Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

August 15, 1986

To

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Robert J. Johannes
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Asst. Attorney

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1407 Hammond Ave.
Superior, WI. 54880

William F. White
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Hon. Douglas S. Moodie
Reserve Judge
Douglas County Courthouse
Superior, WI. 54880

The Court today announced an order in your case as follows:

#84-2358, #84-2359, #84-2360 and #84-2361 Burlington Northern, Inc., et al v. The City of Superior/Burlington Northern Railroad Co., et al v. The City of Superior

Motion for reconsideration is denied, with costs.

Abrahamson, Shirley S., J. did not participate.

MARILYN L. GRAVES

Clerk of Supreme Court

Office of the Clerk

SUPREME COURT

State of Wisconsin

Hon. Douglas S. Moodie
2328 Ogden Ave.
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January 14, 1986

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*

The Court today announced an order in your case as follows:

Nos. 84-2358, 84-2359 & 84-2360 & 84-2361 Burlington Northern, Inc., Burlington Northern Dock Corporation v. City of Superior

The court having considered the court of appeals' request pursuant to sec. (rule) 809.61, Stats., that this court accept the certification of this appeal;

IT IS ORDERED, the certification request is granted and jurisdiction of the appeal is accepted; and

IT IS FURTHER ORDERED, the briefs previously submitted to the court of appeals may stand as the briefs in this court. Ten additional copies of each brief must be submitted within 10 days of the date of this order. Notification of the date and time for oral argument in this appeal will be made in the usual manner.

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*Merrill Hoven
Clerk of Courts
Douglas County Courthouse
Superior, WI 54880

MARILYN L. GRAVES

Clerk of Supreme Court

Nos. 84-2358
84-2359
84-2360
84-2361

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

BURLINGTON NORTHERN, INC., and BURLINGTON NORTHERN DOCK CORPORATION,

Plaintiffs-Appellants,

v.

THE CITY OF SUPERIOR, WISCONSIN,

Defendant-Respondent.

CERTIFICATION BY
COURT OF APPEALS OF WISCONSIN

Before Cane, P.J., Dean and LaRocque, JJ.

We certify this appeal to the Wisconsin Supreme Court to determine whether there is sufficient nexus between this state and Burlington Northern to justify imposing an occupational tax

levied on its dock operations under sec. 70.40, Stats. Burlington Northern challenges the constitutionality of the tax as a violation of the commerce clause. The trial court found a substantial nexus on the basis of Burlington Northern's statewide activities and the revenues generated by the dock operations. While there are several issues raised in this appeal, we conclude that the issue of whether there is a substantial nexus between Burlington Northern and Wisconsin is dispositive.

Burlington Northern seeks a refund of taxes paid under sec. 70.40, an occupational tax levied on its dock operations as measured by the volume of taconite handled by the docks annually. The taconite originates in Minnesota and is consumed outside of Wisconsin. It is shipped by rail from Minnesota to

Superior where it is loaded onto ships at Burlington Northern's docks.

Before a state may directly or indirectly tax interstate commerce, the activity taxed must have a substantial nexus with the state. Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 277, reh'g denied, 430 U.S. 976 (1977). In Midwestern Gas Transmission Co. v. Department of Revenue, 84 Wis. 2d 261, 265-71, 267 N.W.2d 253, 255-58 (1978), the court discussed the "substantial nexus" requirement, concluding that the tax was impermissible where the item taxed is an "integral part of the process of interstate commerce which does not have a substantial nexus within the state." Midwestern Gas involved a tax on fuel consumed by a pipeline to propel the gas through the pipeline. The opinion relied substantially on Helson and

Randolph v. Kentucky, 279 U.S. 245 (1929). In Commonwealth Edison v. Montana, 453 U.S. 609, 615 (1981), the Supreme Court noted that Helson has been undermined by more recent cases. Because the United States Supreme Court has weakened or destroyed the authority relied upon by the Wisconsin Supreme Court in Midwestern Gas, the validity of the holding of Midwestern Gas is questionable. This court lacks the authority to disregard that holding.

We conclude that it is appropriate for the supreme court to determine whether the holding of Midwestern Gas should be applied to this case to require a refund for taxes paid. Burlington Northern contends that its docks are an integral part of the interstate movement of taconite, similar to the gas that fueled the pipeline pumps in Midwestern

Gas. The state argues that the $70,000,000 dock facility and the process of handling 40,000,000 tons of taconite constitute a distinct instate presence sufficient to justify taxation. It is appropriate for the supreme court to determine whether recent developments in the United States Supreme Court's interpretation of the commerce clause require or justify a change in the analysis set out in Midwestern Gas.

STATE OF WISCONSIN CIRCUIT COURT
DOUGLAS COUNTY
****

BURLINGTON NORTHERN RAILROAD COMPANY, BURLINGTON NORTHERN DOCK CORPORATION,

Plaintiffs,

v.

Case No. 79-CV-293
Case No. 80-CV-394
Case No. 81-CV-426
Case No. 82-CV-189

THE CITY OF SUPERIOR, WISCONSIN,

DEFENDANT.
****

MEMORANDUM OPINION
****

These are cases in which the plaintiff seeks a declaratory judgment that taxes which it has paid to the defendant are unconstitutional and for refund of such taxes. The taxes in question were assessed and collected by the defendant each year beginning on May 1, 1977, through and including 1980 and thus separate suits for each year were brought though all are consolidated

for decision. The matter is now before the Court on motion for summary judgment based upon stipulated facts which will be referred to by paragraph and page. Exhibits attached to the stipulated facts are referred to by number. The tax, alleged to be unconstitutional, is imposed by Wis. Stats. 70.40:

> "Occupational tax on iron ore concentrates. (1) Except as provided in Sub. (6), every person operating an iron ore concentrates dock in this state, shall on or before December 15, of each year pay an annual occupational tax equal to 5 cents per ton upon all iron ore concentrates handled by or over the dock during the preceding year ending April 30, except that as of December 15, 1979, such tax shall apply to the year ending on the preceding December 31. Iron ore concentrates taxes under Ss. 70.37 to 70.395 are exempt from taxation under this section . ."
>
> (6) This section does not apply to a municipally owned or operated dock or a dock used solely in connection with an industry and handling no iron

ore concentrates except that utilized by the industry."

I.

F A C T S

The Plaintiff, Burlington Northern (here-in-after, Burlington) is an interstate railroad carrier operating in 16 states. The Plaintiff, Burlington Northern Dock Corporation, is a wholly owned subsidiary of the Burlington. It was formed for the purpose of financing the construction of a "new" dock to more efficiently handle taconite pellets than the "old" docks owned in Superior by Burlington. The new dock is owned by J. P. Morgan Interfunding Corporation and General Electric Credit Corporation and leased to the Dock Corporation which in turn entered into an operation agreement with Burlington to operate it. The dock was constructed in 1977 at a cost of

$68,356,037. Shortly after it was completed S. 70.40 was enacted.

Taconite, which is made from "left-overs" from iron ore mining after extensive processing and pelletizing, is produced primarily in the State of Minnesota. The taconite relevant to this case is produced in plants operated and managed by the Steel Companies who take their share of the production proportionately based on their ownership interests. These companies also had agreements with plaintiff requiring them to ship minimal annual tonages and to pay guaranteed minimum fees. (See stipulated facts: Paragraph 66, p. 42 & Ex. 23, 24, 25 & 26.) Details of ownership and agreements are given in the stipulated facts and exhibits.

The plaintiff transported the taconite pellets in several daily trains

from the various producers in Minnesota to Superior, Wisconsin and the old and new docks. (See diagram, Ex. 16.) When possible, the pellets are unloaded into automated unloading machines and immediately dumped and conveyed to one of the docks for pocket docks or silos and may be immediately loaded into a waiting vessel. At times no vessel might be available and the pellets would be held for the next available ship. If no vessels are available for some time or the dock storage bins were full and in winter when the shipping season was closed, the pellets would be kept in holding piles.

None of the taconite handled on the docks was intended for use in Wisconsin. The taconite was intended for lower lake ports and some Canadian ports. (See Ex. 34 for a chart of the

vessels, courses to the lower lake ports.)

Both old and new docks are located, of course, in the City of Superior. In each year, plaintiff paid under protest taxes imposed under 70.40 the following: 1978, $322,138.85; 1979, $439,385.55; 1980, $655,714.30; 1981, $528,622.05.

Details of the process of mining the crude ore and of the making of the taconite pellets are contained in the stipulation. (See paragraphs 28-31, pps. 15-18 inclusive: Details of production and loading of taconite, paragraphs 32-27, pps. 15-21; Details of distances and travel time are shown in paragraphs 43-51, pps. 26-30; Details of the amount of pellets produced and the distances shipped are shown on Paragraphs 43-46, pps. 26-27; Ex. 18 shows source of

deliveries and percentage consigned to storage.)

During the years in question, Burlington was and is now exempt from Wisconsin corporate franchise and income taxes. Other Wisconsin taxes which it does pay are set forth in Paragraphs 45-88, pps. 52-54 and see Ex. 36. The Dock Corporation pays no Wisconsin taxes. Wisconsin does not nor does any of its municipalities assess a property or add valorem tax on the pellets at any time. Consideration of the pellet movement in calculating Burlington's system-wide market value allocable to Wisconsin is described in Paragraph 92, p. 56.

During the relevant period, the taconite was not made the measure of an occupation tax on its handling at a facility in any other state though the pellets were subject to payment of

personal property taxes in West Virginia, Indiana, and Ohio which were paid by the owners of the taconite pellets.

Taconite pellets were produced from crude ore mined in Wisconsin by the Jackson County Iron Company. Such pellets were the only taconite pellets produced in Wisconsin during the relevant period. These pellets were transported by rail and were not handled over any dock. (Pages 57-58)

There were no operations within the meaning of 70.40(6) by a municipality or industry within the State of Wisconsin.

Burlington Northern's gross Wisconsin revenues ranged from $70,510,393 in 1977 to $115,947,965 in 1980. The gross operating revenues with respect to taconite pellets during the period in issue ranged from $15,000,000

to $36,000,000. (See Paragraph 102, pps. 59-60.)

Burlington Northern employed about 1,750 persons in Wisconsin. About 850 of these persons (paychecks addressed to Wisconsin residents) lived in the City of Superior and about 125 of such persons were employed in connection with the dock facility.

II.

I S S U E S

The plaintiff argues that the tax imposed by Section 70.40 violates the Commerce Clause of the United States Constitution and specifically fails each of the four requirements for a valid state tax respecting interstate commerce as set forth in Complete Auto Transport v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326 (1977). In addition, plaintiff contends

that Section 70.40, having imposed a tax on pellets exported from Wisconsin to Canadian cities, violates the Import-Export Clause of the United States Constitution. Also, the statutory exemption for Wisconsin produced taconite is alleged to be discriminatory. Finally, the plaintiff argues that Section 70.40 is a property tax substitute subject to uniformity requirements of Art. VIII, Sec. 1, Wisconsin Constitution, since manufacturer's materials, in this case, taconite pellets, are exempt. Plaintiff argues that therefore they are not uniformly treated.

Defendant City reminds the Court that the burden of proof of one asserting the unconstitutionality of a statute is a "heavy" one and is on the plaintiff and that there is a presumption of constitutionality. Both Defendant City and the

Attorney General deny any obstruction of the Commerce Clause and assert complete satisfaction of all four prongs of the Complete Auto test. The joint argument is made that plaintiff confuses the nature of the tax with the measure of the tax--that here we have an occupation tax on the privilege of operating a dock facility measured by the tonnage that is handled by the facility locally. For this reason, they see no violation of the Export-Import Clause nor of the uniformity clause of the Wisconsin Constitution. In addition, defendant argues as to claimed discrimination, it is actual discrimination that must be shown in the practical operation of the statute. Thus, says the defendants, plaintiff has shown no Wisconsin producers who have used the dock facility and gained the exemption, but even if

they had, plaintiff's liabilities would have been unaffected or conversely would have been greater but for the exemption.

III.

D E C I S I O N

I uphold the constitutionality of Section 70.40 and dismiss plaintiff's complaint for the reasons that follow:

Before proceeding directly to the difficult questions involved in deciding constitutionality of Section 70.40, I feel I must, at the outset, determine the nature of the tax since that determination affects several aspects of the decision. Plaintiff contends the tax is a "property tax substitute" or is "in practical effect, a property tax." The emphasis throughout plaintiff's argument, then, is on the economic effect and burden of the tax on the taconite

pellets. Defendant counters that plaintiff confuses subject of the tax with its measure and that the only subject of this tax is the business or operating a dock for loading and unloading iron ore concentrates.

I believe the position of the defendant is the correct one, mandated by the decisions of the legislature and the Wisconsin Supreme Court. It is of some significance to note that Wisconsin has had, long previous to the passage of Section 70.40, a pattern of occupational taxes on dock and transshipment facilities: 70.42, occupational tax of 1 1/2 cents a ton handled on coal docks; 70.41, occupational tax on grain elevators of 1/2 mill per hundred; 70.415, occupational tax on scrap iron

dock of 3 1/2 cents per ton handled. See Thrig, "Occupational Taxes," 17 Marq. L. Rev. 19 (1932).

An industry exemption similar to that in 70.40 was granted in the coal dock tax and that type of tax was viewed by the Court as an effort by the legislature "to subject the industry to a more reasonable proportion of the tax burden." State ex rel Carneigie Doc v. Beckley, 186 Wis. 80 (1925). The Court, facing the argument that the occupational tax on grain (70.41) was a property tax held that it was not. The Court explained that it was the clear right of the legislature to designate the nature of its taxes and that it had been clearly established here that the tax was an occupational tax. State ex rel Bernhard Stern & Sons v. Bodden, 165 Wis. 75 (1917). The term "in lieu of property

tax," the Court viewed as of no legal significance but simply a judgment of the legislature. I understand, of course, that the legislature can not designate one form of tax but impose another without being subject to judicial review. State ex rel Froedert Grain & Malting Co. Inc. v. State Tax Commission, 221 Wis. 225 (1936). I do not see that case as requiring a determination by the Court of tax differing in nature from that designated by the legislature in view of the clear pattern of occupational taxes established by the legislature over the years and without other persuasive reasons.

In addition, it may have been noted by the legislature in this Great Lakes State that the dock area in our Wisconsin port cities is indeed a limited state resource. The state legislature has a

right to consider and to have an interest in that limited resource; to see that such a resource is protected and bears its fair proportion of taxes somewhat in the same manner as a state protects and taxes its exhaustible state natural resources.

I can not find that plaintiff's authority that the designation of the nature of a tax by the legislature is not necessarily controlling and compels the step further that plaintiff requests: i.e. that the legislative designation must be disregarded. Here there is a clear legislative determination with a pattern of legislative history. I find that the tax is an occupational tax.

The questions presented by constitutional challenge to a statute involving inter-state commerce application are difficult of resolution. At least one

commentator has said that the United States Supreme Court "has produced a 'quagmire' of inconsistently reasoned decisions." State Taxation of Inter-state Business, 29 U of Florida Law Rev. 752 (1977). The Supreme Court itself has noted the difficulties of reconciling the large number of its decisions in the field. See Miller Bros. v. Maryland, 347 U.S. 340, 344 (1954); Freeman v. Hewit, 329 U.S. 249, 252 (1946). Reviews of the history of the law in this field of varying degrees of depth and quality may be found readily among the many commentators in the field; State Taxation of Interstate Business, 62 Va L Rev. 149; State Taxation on the Privilege of Doing Inter-state Business, 1978 Boston College L Rev. 112; Severance Taxes and the Commerce Clause, 1983 Wis. Law Rev. 427.

Briefly (and much over-simplified) those articles trace the Supreme Court's early cases prohibiting any state action in the field based on the premise that the power to tax implies the power to destroy. Thereafter, recognizing the need for some state revenue in the area, the Court developed the "direct-indirect" theory-striking the "direct" tax while upholding the "indirect" tax. Then, in Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938), the Court indicated inter-state commerce should bear its fair burden so long as it was fairly apportioned within the taxing state. However, in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), where the tax seemed non-discriminatory and fairly apportioned it was held invalid. But then came Complete Auto., supra (1977). This case upholding a Mississippi

privilege tax specifically overruled Spector and established four criteria that must be met before a state tax affecting inter-state commerce can be upheld.

Plaintiff says these four criteria are not met here. I disagree and they will be discussed in order:

(1) Nexus.

All parties agree on the four prongs of Complete Auto tests, the first of which is nexus, or a minimum connection between the taxed activities and the taxing state. Plaintiff relies on our Wisconsin Supreme Court's interpretation of nexus in Midwestern Gas Transmission Co. v. Dept. of Revenue, 84 Wis. 2d 261, (1978).

It seems to me, however, that this case is not persuasive authority that adequate nexus does not exist in the

instant case. In Midwestern Gas, the Department attempted to collect a sales and use tax solely upon gas consumed by engines providing the pressure necessary to propel the great bulk of the taxpayers' gas through the pipeline in inter-state commerce. This activity simply did not have "substantial nexus" with the state.

In the instant case the taxpayer caused the "new" dock facility to be built expressly for its use to handle taconite at a cost in excess of sixty-eight million dollars and is the lessor and apparent sole operator of the facility through its wholly owned subsidiary. Plaintiff employs about 125 persons at the facility and another 1,625 persons in the state. Plaintiff had gross operating revenues during the relevant period from over 70 million

dollars in 1977 to over 115 million in 1980 of which about 15 million in 1977 and 36 million in 1980 were from taconite operations at the dock.

In National Geographic Society v. Cal. Brd. of Equalization, 430 U.S. 551, 51 L Ed 2d 631 (1977), the Supreme Court held there was sufficient nexus where the Society had two offices in the state even though the two offices had nothing to do with the tax activity, which in this case was a "use" tax as distinguished from a direct tax. The Court found sufficient connection under the circumstances. See also Exxon Corp. v. Wis. Dept. of Revenue, 447 U.S. 207, 65 L Ed 66 (1980), Colonial Pipeline v. Traigle, 421, U.S. 100, 44 L Ed 2d 1, (1978). In view of the holdings in these and other cases, it seems to me there is clearly sufficient "nexus" in the instant case.

(2) Fair Apportionment.

The second prong of the Complete Auto criteria requires that the state tax be fairly apportioned to the local activity. Plaintiff relies largely on Michigan-Wisconsin-Pipeline v. Calvert, 347 U.S. 157, 98 L Ed 583 (1954). A review of the facts of that case, however, shows a considerable difference in the situation involved. Plaintiff there was a pipeline company not selling in Texas and it produced no gas of its own. It purchased from a Texas company which collected the gas and transmitted it 300 yards through its own pipes to the boundaries of plaintiff's property where meters were installed. It was the "taking" there that was the subject of the Texas tax. It was an "occupational" tax but exclusive of that tax, plaintiff paid an ad valorem tax on the value of

all its facilities and leases in the state. The United States Supreme Court did not agree with the Texas Court that the "taking" was just as local in nature as the production itself. The Court felt that the gas had already begun its movement in inter-state commerce. The Court also foresaw possibilities of multiple taxation.

It seems to me there is a difference of substance between the constant flow of gas involved in the gas pipeline case and an occupational tax on a substantial facility where the interstate commerce product is, at time speeded through the facility and at other times stockpiled for varying periods up to several months. The tax in Texas was on the "gathering" but the product was in continuous flow in its journey in inter-state commerce. Further, later cases

have indicated that the risk of multiple taxation must be more than asserted--it must be shown: Dept. of Revenue of State of Washington v. Stevedoring Assn. 435 U.S. 734, 55 L Ed 682 (1978); Exxon Corp. v. Wis. Dept. of Revenue, 447 U.S. 207 65 L Ed 66 (1980); and see J.C. Penney Co. Inc. v. Hardesty, 264 S.E. 2d 604 S. W. (1980). I find that this taxation of the right to operate the dock facility does not violate the fair apportionment requirement.

(3) Discrimination.

The third prong of the Complete Auto requirement is that the state tax does not discriminate against inter-state commerce. Plaintiff here points to the statutory exemptions for iron ore concentrates produced and taxed in Wisconsin under the net proceeds tax and also the exemption granted to taconite

handled by a dock used solely in connection with an industry and handling no iron ore concentrates except that utilized by the industry. Here, plaintiff relies primarily on Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 50 L Ed 2d 514 (1977) and Maryland v. Louisiana, 451 U.S. 725, 68 L Ed. 2d 576 (1981).

It is true that the tax is on the privilege of operating the dock facility and the measure is the volume of taconite handled. While the exemption is such that it would mean no tax computed for the added Wisconsin taconite, it is the advantage thus given to Wisconsin producers that is the claimed discrimination. Defendant argues that no such Wisconsin concentrates have ever used the facility. I do not read the cases cited by plaintiff as similar in this respect

to the multiple taxation cases. I believe the exemption does create discrimination within the meaning of the Complete Auto if the exemption were allowed to stand. See also Westinghouse Electric Corp. v. Tully, U.S. Law Week, 4-24-84. However, and particularly where the exemption has never been used, I believe it is severable and may be declared invalid without affecting the validity of the statute as a whole. (Wis. Stats. 990.001(11)). I do not view the exemption for an industry (which might or might not be in inter-state commerce) in the same light and do not see that is in any way discriminatory. I therefore find the exemption as to Wisconsin proposed taconite invalid but severable and not affecting the validity this tax imposed by Section 70.40.

(4) Fairly related to services provided.

With respect to the fourth prong of the Complete Auto test-- that the tax be fairly related to the services provided by the state--both parties cite and rely on Commonwealth Edison Co. v. Montana, 453 U.S. 609, 69 L Ed 884 (1981). Again, however, plaintiff argues that we are considering a tax on the taconite itself and that it must relate to the contacts with the state. (Miles traveled in the state, etc.)

As previously stated, I disagree with plaintiff's position in this regard. We are concerned with an occupational tax on a dock facility, which with the employees and other facilities of plaintiff present a substantial connection with the state. As Commonwealth points out, the fourth prong is closely connected with the first

prong. Here the tax is measured by volume of taconite pellets handled at the facility. It seems to me therefore in "proper proportion" to the taxpayers activities within the state; and therefore the taxpayer is shouldering a fair share of the state provision of police, fire, and state administration and "advantages of a civilized society." Exxon v. Wis. Dept. of Revenue, supra.

It is not, of course, for this Court to make any determination respecting the propriety of the amount of the tax or revenues or costs involved. These are not matters for the Court, but for the legislature.

(5) The tax violates the Import-Export Clause.

In addition to the claim of unconstitutionality based on the commerce

clause, plaintiff asserts that Section 70.40 violates the Import-Export Clause. This clause, of course, prohibits a state without Congress' consent from laying any imposts or duties on imports or exports . . . Plaintiff relies on Richfield Oil v. State Board of Equalization, 329 U.S. 91 L Ed 80 (1949). The California tax there held unconstitutional involves facts substantially different from the instant case. The transaction involved a California seller with the sale of oil to a New Zealand buyer with delivery to harbor storage tanks and from there to a steamer. California collected a retail sales tax measured by gross receipts from the sale. The retailer was specifically authorized by statute to collect the tax from the consumer. The Court held this violated the prohibitions against the tax

on the goods. Here the tax is on the local dock facility measured by the amount of taconite pellets handled. It is difficult to see how this in any sense imposes an impost or duty. The Supreme Court has in a much later case indicated a tax on handling goods would not be deemed a tax on the goods themselves and therefore not a violation of the Import-Export Clause. Washington v. Stevedoring Assn. supra, (1978). We have in the instant case no interference with federal foreign policy and no inter-state rivalry or friction to result. The instant tax is not related to the value of the taconite but rather to volume handled. I believe plaintiff has failed to establish that the tax in question violated the Import-Export Clause.

(6) Plaintiff argues the taconite is not assessed uniformly.

The argument of plaintiff in this respect is based on the uniformity clause of the Wisconsin Constitution, Article VIII, Section. Plaintiff acknowledges that to make this argument, the assumption must be made that we are dealing with a property tax. I, for reasons set forth above, am unwilling to make that assumption and therefore this point requires no further discussion.

For the reasons stated above, with the exception of the exemption granted to Wisconsin ore concentrates under Ss. 70.37 to 70.395 which I find unconstitutional, I find Section 70.40 to be constitutional.

Plaintiff's motion for summary judgment is denied. Defendant's attorney

may draw findings, conclusion, and judgment in accordance with this opinion.

Dated this 12th day of June, 1984, in Superior, Wisconsin.

BY THE COURT:

Douglas S. Moodie
Reserve Judge

STATE OF WISCONSIN CIRCUIT COURT
DOUGLAS COUNTY

BURLINGTON NORTHERN, INC.,
BURLINGTON NORTHERN DOCK
CORPORATION,

Plaintiffs,

v. Case Nos. 79-CV-293
80-CV-394

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

BURLINGTON NORTHERN RAILROAD
COMPANY, BURLINGTON NORTHERN
DOCK CORPORATION,

Plaintiffs,

v. Case Nos. 81-CV-426
82-CV-189

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendant, The City of Superior, Wisconsin, having moved, based upon stipulated facts, for Summary Judgment,

the Court having heard the oral arguments made, considered the Briefs filed, and rendered its Memorandum Opinion (which is incorporated herein by reference), the Court hereby finds and decides as follows:

Findings of Fact

1. Each fact stated and contained in the Stipulation of Facts (and in the Exhibits attached thereto) by and between plaintiffs and defendant, dated July 28, 1983, and filed with the Court by defendant in support of its Motion for Summary Judgment be, and they hereby are, incorporated herein by reference as though set forth herein in their entirety.

Conclusions of Law

1. Plaintiffs have failed to carry their burden of proof and have failed to demonstrate that Section 70.40, Wis. Stats., is unconstitutional.

2. Subject to the conclusion contained in Paragraph 7 hereof, Section 70.40, Wis. Stats., does not violate the commerce clause of the United States Constitution.

3. The subject of the tax imposed by Section 70.40, Wis. Stats., is the business of operating in the State of Wisconsin a warf or platform for the loading or unloading of iron ore concentrates to or from ships. The amount of iron ore concentrates handled constitutes the measure of the tax, not its subject.

4. The tax imposed by Section 70.40, Wis. Stats., constitutes an occupational, and not a property, tax.

5. Plaintiffs and plaintiffs' activities which render it subject to the tax imposed by Section 70.40, Wis. Stats., have a sufficient nexus with the State of Wisconsin and the City of Superior, Wisconsin to support the imposition of the Section 70.40, Wis. Stats., tax upon plaintiffs.

6. The tax imposed by Section 70.40, Wis. Stats., is fairly apportioned.

7. The exemption from the measure of the tax contained in Section 70.40(1), Wis. Stats., for iron ore concentrates taxed under ss. 70.37 to 70.395, discriminates against interstate commerce; but is severable and does not affect the validity of the tax imposed

upon plaintiffs by Section 70.40, Wis. Stats.

8. The tax imposed by Section 70.40, Wis. Stats., is fairly and reasonably related to the services provided to the plaintiffs by the City of Superior and the State of Wisconsin.

9. The tax imposed by Section 70.40, Wis. Stats., is not an impost or duty, and does not violate the import-export clause to the United States Constitution.

10. Section 70.40, Wis. Stats., does not violate the uniformity requirement contained in Article VIII, Section 1, of the Wisconsin Constitution.

Signed this _____ day of September, 1984.

BY THE COURT:

_____
Douglas S. Moodie
Reserve Judge

Approved as to Form:

_____
Robert A. Schnur
Attorney for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT
DOUGLAS COUNTY

BURLINGTON NORTHERN, INC., BURLINGTON NORTHERN DOCK CORPORATION,

Plaintiffs,

v. Case Nos. 79-CV-293
80-CV-394

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

BURLINGTON NORTHERN RAILROAD COMPANY, BURLINGTON NORTHERN DOCK CORPORATION,

Plaintiffs,

v. Case Nos. 81-CV-426
82-CV-189

THE CITY OF SUPERIOR, WISCONSIN,

Defendant.

FINAL JUDGMENT

Defendant, The City of Superior, Wisconsin, having moved, based upon stipulated facts, for Summary Judgment, the Court having heard the oral arguments

made, considered the Briefs filed, rendered its Memorandum Opinion, and entered Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the motion of defendant, The City of Superior, Wisconsin, for summary judgment be, and it hereby is, granted.

2. That plaintiffs' complaints be, and they hereby are, dismissed in their entirety, on their merits and with prejudice.

3. That defendant, The City of Superior, Wisconsin, be, and hereby is, awarded its statutory costs, attorneys' fees and disbursements in the sum of $414.81.

Signed this _____ day of September, 1984.

BY THE COURT:

_____
Douglas S. Moodie
Reserve Judge

Approved as to Form:

_____
Robert A. Schnur
Attorney for Plaintiffs

SECTION 1216B. 70.40(1) of the statutes is amended to read:

70.40(1) ~~Except as provided in sub. (6),~~ every Every person operating an iron ore concentrates dock in this state, shall on or before December 15 of each year pay an annual occupational tax equal to 5 cents per ton upon all iron ore concentrates handled by or over the dock during the ~~preceding~~ year ~~ending April 30 except that as of December 15, 1979, such tax shall apply to the year~~ ending on the preceding December 31. ~~Iron ore concentrates taxed under ss. 70.37 to 70.395 are exempt from taxation under this section.~~ In this section "dock" means a wharf or platform for the loading or unloading of materials to or from ships.

SECTION 1216d. 70.40(6) of the statutes is repealed.